INDEX

PAGE

Statement 3

Argument 7

Conclusion 12

Appendix:

Rule 5(7) of the Supreme Court of Delaware 14

CASES CITED

Alaska Industrial Board v. *Chugach Elec. Assoc., Inc.*, 356 U. S. 320, 325 (1958) 7

Bailey v. *Anderson*, 326 U. S. 203, 206-07 (1945) 9

Cottrell v. *Pawcatuck Co.*, 36 Del. Ch. 169, 128 A. 2d 225, 233 (Sup. Ct. Del. 1956), *appeal dismissed*, 355 U. S. 12 (1957) 9

Federal Trade Commission v. *Pacific States Paper Trade Assoc.*, 273 U. S. 52, 66 (1927) 7

Herb v. *Pitcairn*, 324 U. S. 117, 125-26 (1945) 12

John v. *Paullin*, 231 U. S. 583, 585 (1913) 9

Lagnes v. *Green*, 282 U. S. 531, 537-39 (1931) 7

McGoldrick v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434 (1940) 7

Morley Construction Co. v. *Maryland Casualty Co.*, 300 U. S. 185, 191-92 (1937) 7

Newman v. *Gates*, 204 U. S. 89, 95 (1907) 10

PAGE

United States v. *American Ry. Express Co.*, 265 U. S. 425, 435 (1924) 7

Warner Co. v. *Independent Pier Co.*, 278 U. S. 85, 91 (1928) 7

Williams v. *Georgia*, 349 U. S. 375, 382-83 (1955) .. 9

STATUTES AND RULES

---

28 U. S. C. § 2101(c) 2, 7

10 Del. Code Ann. § 145 (Supp. 1962) 5

Rules of the Supreme Court of the United States

Rule 23(1)(f) 3, 8

Rule 23(3) 3

Rule 24(1) 6, 7

Rule 40(5) 3

Rules of the Supreme Court of Delaware

Rule 5(7) 9

MISCELLANEOUS

---

5 Am. Jur. 2d *Appeal and Error* § 707 (1962) 8

Note, 51 HARV. L. REV. 1058 (1938) 8

7 MOORE'S FEDERAL PRACTICE, para. 72.05 (2d ed. 1955) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

ARTHUR HOFFMAN,
Petitioner,

against

CHRYSLER CORPORATION, *et al.*, and
PAUL C. ACKERMAN, *et al.*,
Respondents, Defendants below,

and

SOL A. DANN, *et al.* and
MARY L. GALLO, *et al.*,
Respondents, Plaintiffs below,

and

HERMAN KOENIGSBERG and
VIRGINIA S. JUDSON, *et al.*,
Respondents, Objectors below,

and

ERWIN H. EZZES,
Petitioner (No. 954, October Term 1964),
Objector below

No. 893

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF DELAWARE

SUPPLEMENTAL BRIEF OF CERTAIN DEFENDANTS BELOW, RESPONDENTS, IN REPLY AND OBJECTION TO BRIEF OF SOL A. DANN, PLAINTIFF BELOW

Sol A. Dann, an attorney and a party to the settlement made in the court of first instance filed in this Court on April 13, 1965 a purported "Brief of Sol A. Dann, Plain-

tiff Below, In Support of Petitions for Certiorari".* Dann has no standing to seek or urge certiorari at this time and Dann's brief should be disregarded and stricken by this Court for many reasons.

Admittedly, Dann, named as a respondent herein, has deliberately waited until after the expiration of both the time to file a petition for certiorari and the time for respondents to file briefs before he decided to submit anything to this Court, because as he says he "had hoped and relied upon 'objectors' to fully and accurately explain his position before the court" (DB 2). Dann's brief purports to be in support of petitions for certiorari filed by Hoffman in No. 893 and Ezzes in No. 954, but does not deal with the grounds asserted in those petitions, and instead discourses upon Dann's private "Frustrated . . . Predicament" and his personal problems in connection with the settlement, which turn upon certain of the findings in the decisions below and not upon the result (DB 15; RA 35-36; DB 11-12, 22; DBA 84, 87).

As a respondent, Dann could have filed a cross-petition for certiorari if he thought he had the standing and a federal basis for attacking the judgment below. But such a cross-petition had to be filed within 90 days from the entry of the judgment below and that time expired long ago. 28 U. S. C. § 2101(c). Dann has no more standing to attack in this Court the judgment below than he did in the Supreme Court of Delaware, which struck his similarly belated sub-

*Further references to numbered pages of the Brief of Sol A. Dann, Plaintiff Below in Support of Petitions for Certiorari, will be preceded by the abbreviation DB and to the Appendix annexed thereto by the abbreviation DBA. References to numbered pages of other appendices will be preceded by the following abbreviations: RA for Appendix of Certain Defendants Below, Respondents in Opposition in No. 893, Oct. Term 1954; DA for Appendix of Certain Defendants Below, Appellees filed in the Supreme Court of Delaware.

mission of a brief complaining of the judgment in the Court of Chancery, after the time to appeal had expired (DBA 75). Apart from its being procedurally ineffective, Dann's brief fails to specify or raise any federal question of substance. Moreover, it should also be stricken for failure to comply with Rules 23(1)(f) and 40(5) of this Court, particularly since it contains a large amount of irrelevant and scandalous matter. Finally Rule 23(3) of this Court stating that "No separate brief in support of a petition for certiorari will be received . . ." applies as well to an independently submitted brief of a private party as to a brief attached to a petition for certiorari.

STATEMENT

Dann was one of several plaintiffs who brought a stockholders' derivative suit on behalf of Chrysler Corporation in the Court of Chancery of Delaware in August, 1960. His deposition was taken and by court order he was required to produce all relevant papers which might support his charges (DA 287-301). The papers produced by Dann, which failed to sustain his causes of action, were made part of the record in the Court of Chancery. After further extensive discovery proceedings, a settlement was made with Dann, as well as other stockholder plaintiffs in the two stockholders' suits then pending in the Court of Chancery (DA 7-8). Dann's attorneys submitted to the Court of Chancery an order providing for a hearing to determine the fairness of the settlement and asking the court to approve a proposed notice of hearing to the stockholders (DA 340). With minor modifications the proposed notice was approved and was sent to the stockholders.

The notice submitted by Dann's attorneys contained their conclusions as to the merits of each claim to be settled. Dann thereafter objected to his attorneys' concessions as to

the lack of merit to the claims and was required to produce all of his files and to testify at the hearing of evidence on the fairness of the settlement (DA 377-388, 397-398). In his testimony, Dann testified in favor of the settlement and admitted that the notice was sufficient and that he had no other evidence that would throw any light on the charges (DA 413, 421). Dann's original charges, many of which he again reasserts, were fully explored by his attorneys in the discovery before the making of the settlement; they were again explored in discovery by other stockholders who appeared to object to the settlement; they were the subject of testimony and other evidence at hearings in the Court of Chancery, which examined them and found "little, if anything" to them; they were then reviewed by the Supreme Court of Delaware, which found them to be "devoid of merit" (DA 7-8; *e.g.*, RA 26-29; RA 58; DA 409, 421; RA 93; DBA 66).

Dann personally participated in the settlement negotiations and the settlement agreement was subscribed to by Dann's law firm on his behalf and, after the hearings on the fairness of the settlement, his law firm joined in a brief submitted in support of it (DA 422-24, DA 40). In his testimony at the hearings before the Court of Chancery, Dann personally supported the settlement (DA 413).

Until the decision of the Court of Chancery on December 31, 1963 which contained findings he found "embarrassing", Dann had no quarrel with the settlement (DA 431-32). In his complaint Dann had made serious charges against many responsible persons. The court found they had no substance. Thereafter, Dann modified his position regarding the settlement by taking exception to the findings on which the approval of the settlement was based and asked that the hearings be re-opened to re-explore his files and charges (DBA 32-37).

When questioned by the court on his application to reopen, Dann stated in open court that he did not repudiate the testimony he gave at the hearing (DA 438). The Chancery Court found no basis or need for any further hearings and denied Dann's application. It entered the final decree and judgment approving the settlement on March 9, 1964. Since Delaware law allows only 60 days from the date of judgment to appeal to the Supreme Court of Delaware, 10 Del. Code Ann. § 145 (Supp. 1962), the time to appeal expired on May 8, 1964.

Dann took no appeal. His own law firm again joined in a brief supporting the settlement and also the judgment below. However after the time to appeal had expired, Dann submitted by letter dated June 29, 1964 an "Appendix of Plaintiff 'Appellee' Sol A. Dann" and thereafter submitted a "Brief of Plaintiff, Sol A. Dann" dated August 29, 1964 to the Supreme Court of Delaware, attacking the judgment of the Court of Chancery. Since under well recognized Delaware practice one who has not taken an appeal cannot argue in opposition to the judgment below, certain defendants below moved to strike the "Brief of Plaintiff Sol A. Dann". Dann filed a "Reply of Sol A. Dann to Motion of Certain Defendants to Strike His Brief," in time for the consideration of the Supreme Court of Delaware prior to the day set for oral argument, September 21, 1964.

The Supreme Court of Delaware affirmed the judgment of the Court of Chancery approving the settlement in an opinion dated November 17, 1965 and entered November 18, 1965. In its opinion, the Supreme Court of Delaware granted the motion to strike Dann's brief in the following language (DBA 75):

> "Some of the other appellees filed a motion to strike the brief of Dann on the ground that he had

> no standing before us to argue in opposition to the Chancellor's judgment since he had not taken an appeal therefrom. We think the position taken by these appellees is correct and that the plaintiff Dann, appellee here, has no standing to argue in opposition to the judgment below [Citing Delaware cases]. The brief of the appellee, Sol. A. Dann is accordingly ordered struck from the record." 205 A. 2d at 355.

Petitions for reargument of the decision of the Supreme Court of Delaware were filed by Dann, Koenigsberg and the plaintiffs in Civil Action No. 1330, except Dann. They were denied December 4, 1964. The mandate of the Supreme Court of Delaware issued on December 7, 1964 and it was entered in the Court of Chancery December 8, 1964.

Thereafter on February 10, 1965, 84 days after the entry of the opinion of the Supreme Court of Delaware, Arthur Hoffman filed a petition for certiorari in No. 893. Briefs in opposition were filed by certain respondents within the 30 days prescribed by Rule 24(1) of this Court.

On March 4, 1965, 106 days after the entry of the opinion of the Supreme Court of Delaware, Ezzes filed a petition for certiorari in No. 954. Again, briefs in opposition were filed by certain respondents within 30 days after the receipt of Ezzes' petition. Ezzes filed a reply brief in support of his petition for certiorari on April 6, 1965.

Then came Dann, *in propria personam*, by letter to the Clerk of this Court dated April 7, 1965, requesting permission to argue against the decision below. Dann's brief was filed in this Court on April 13, 1965, 146 days after the entry of the opinion below and 126 days after the entry of the mandate of the Supreme Court of Delaware.

ARGUMENT

1. Dann's brief is entitled to no consideration by this Court and should be stricken from the files. The 90 day time limit for filing a petition or cross-petition for writ of certiorari to review a judgment below is jurisdictional 28 U. S. C. § 2101(c). Dann is not even entitled to submit a brief as respondent in opposition to either petition since by Rule 24(1) of this Court a brief in opposition must be filed within 30 days of the receipt of a petition for certiorari. The petition in No. 893 was filed on February 10, 1965. The petition in No. 954 was filed on March 4, 1965. April 3, 1964 was the last day for Dann to file a brief in opposition to the petition in No. 954.

Even if Dann's brief had been filed within 30 days from his receipt of either of the petitions, as a respondent he would not be permitted to argue against the decision below. A nongovernmental party in the position of a respondent who does not file a cross-petition for certiorari, may not argue in opposition to the decision below. *United States* v. *American Ry. Express Co.*, 265 U. S. 425, 435 (1924). Although *United States* v. *American Ry. Express Co.* spoke in terms of appeal and cross-appeal, the principle of law is the same for petition and cross-petition for certiorari. *Alaska Industrial Board* v. *Chugach Elec. Assoc., Inc.*, 356 U. S. 320, 325 (1958); *Lagnes v. Green*, 282 U.S. 531, 537-39 (1931); *Warner Co.* v. *Independent Pier Co.*, 278 U. S. 85, 91 (1928); *Federal Trade Commission* v. *Pacific States Paper Trade Assoc.*, 273 U. S. 52, 66 (1927).

In the absence of a cross-petition, a respondent cannot attack the decree below to enlarge his own rights or to lessen his adversary's. *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 191-92 (1937) *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434

(1940). See 7 MOORE'S FEDERAL PRACTICE, para. 72.05 (2d ed. 1955); 5 Am. Jur. 2d *Appeal and Error* § 707 (1962); Note, 51 HARV. L. REV. 1058 (1938) ("Since the February term of 1796 when a decision involving the problem was first reported, the [Supreme] Court, without a single dissent being voiced, has consistently adhered to the principle that the respondent may not, in the absence of a cross appeal, challenge the judgment of the lower court [footnotes omitted]").

2. Dann's attempt to seek review by this Court of the Delaware Supreme Court decision is also subject to other glaring jurisdictional defects. Dann has not complied with Rule 23(1)(f) of this Court specifying the stage of the proceedings in the court of first instance, at which, and the manner in which, the federal questions he seeks to review were raised. He cannot do so because no federal question was properly raised at the trial level.

On page 6 of his brief to this Court, Dann alludes to the "Appendix of Sol A. Dann filed in the Supreme Court of Delaware," which he fails to print in the Appendix submitted to this Court. Of the nine page references he cites from this unprinted material for the proposition that "These Federal questions were duly, timely and repeatedly raised before Chancellor Collins J. Seitz because the *stockholders' notice is contrary to SEC regulations*" (DB 6), seven make no reference whatsoever to any SEC regulations and the other two refer to portions of a private six page letter by Dann to his co-counsel dated January 24, 1964, written after the decision of the Court of Chancery approving the settlement. Moreover, copies of Dann's letter of January 24, 1964 to his co-counsel were never served on counsel of record for the other parties in the Court of Chancery. (Appendix of Sol A. Dann filed in Supreme Court of Delaware, A-6).

As for Dann's contention that he raised federal questions before the Supreme Court of Delaware, it is enough to say that Delaware procedure requires that a question be raised at the trial level before it will be reviewed by the Delaware Supreme Court. Rule 5(7) of the Supreme Court of Delaware. Consequently when a party tries to raise a federal question for the first time on appeal to the Delaware Supreme Court, that court will decline to consider the question. *Cottrell* v. *Pawcatuck Co.,* 36 Del. Ch. 169, 128 A. 2d 225, 233 (Sup. Ct. Del. 1956), *appeal dismissed,* 355 U. S. 12 (1957). This Court has recognized that a state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, is a valid exercise of state power. *Williams* v. *Georgia,* 349 U. S. 375, 382-83 (1955); *Bailey* v. *Anderson,* 326 U. S. 203, 206-07 (1945).

In addition, Dann was not properly before the Supreme Court of Delaware as an appellant since he had not filed a timely appeal from the decision of the Court of Chancery. Again the Delaware Supreme Court was within its rights in failing to pass on any question raised by Dann. In striking Dann's brief from the record, the Delaware Supreme Court did not pass on any of the merits of Dann's contentions, but held only that it should not do so because its appellate jurisdiction was not properly invoked in accordance with the laws of the state. A state has the power to prescribe the jurisdiction of its appellate courts, and the rules of practice to be applied in its exercise, and the state law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of state law. *John* v. *Paullin,* 231 U. S. 583, 585 (1913). In striking Dann's brief, nothing was decided but the preliminary question of the court's jurisdiction to pass upon the matters raised in Dann's brief,

and that question was resolved according to what the court deemed to be the true construction and effect of applicable provisions of state law. *Newman* v. *Gates,* 204 U. S. 89, 95 (1907).

Dann's continued lack of respect for simple and well known appellate procedures not only deprives this Court of jurisdiction to consider his legal arguments, but also reinforces the conclusion that his claims are entirely without substance.

3. Although Dann's position in this Court is far from clear, it appears that he is objecting to the lower courts' approval of the settlement either (1) because the court-approved notice to stockholders did not refer to Dann's "evidence" in support of the allegations of the complaint, (2) because Dann's "evidence" was such as to preclude the lower courts from approving the settlement or (3) because the settlement, in some unspecified manner, was not fairly arrived at.

The notice to stockholders submitted to the court for approval by Dann's own attorneys and vouched for by his attorneys and himself personally at the settlement hearings was the subject of careful consideration by the Court of Chancery which found it sufficient (DA 340, 365-66, 369-374, 412-413, 420-421). Because of Dann's repeated reiteration of his charges, he has been called upon over and over again to show something to support them and each time he has failed to do so, even admitting under oath he had no evidence other than that adduced at the hearings (DA 287-301, 318-320, 309-310, 329-331, 377-383, 397-398, 409, 412-413, 420-421). Instead, he attacked his own attorneys for conceding the lack of merit in his claims and eventually the courts below for agreeing that they were without merit. After the decision of the Court of Chancery, he again reiterated his charges.

The Court of Chancery carefully considered Dann's charges and "read carefully all the material which [Dann] sent me, including the communications with counsel. * * * [I]t is my conclusion that at best Mr. Dann would only hope to be able to turn up something if there were further discovery permitted" (DA 457-458). In its opinion the Court of Chancery stated (RA 93):

> "Having considered the nature of the claims and possible defenses, I agree with the basic position of the defendants and objectors that there is little, if anything, to the causes of action asserted by the plaintiffs."

And the Supreme Court of Delaware characterized plaintiffs' claims as "devoid of merit" and said that "it was proper for the Chancellor to conclude, in view of the desirability of terminating litigation which, at best, was a harassment of Chrysler, to approve a settlement" (DBA 71).

Dann's contention that the settlement was not fairly arrived at was also fully considered below. At a hearing on February 24, 1964, the Court of Chancery stated (RA 58-59):

> "As I understand it, in substance [Dann] has done no more than state what he stated on the witness stand at the hearing on the settlement, except now he accuses counsel somehow of a conspiracy.
>
> " . . . the Court was very conscious of the claim that somehow this was not a settlement fairly arrived at. . . .
>
> ". . . All I can say is that feeling as I do, a great responsibility to see that the settlement is only ap-

> approved if it is fair and in good faith, I have found nothing in the matters presented to me which would justify further hearings or modification of this settlement."

Thus, the points Dann is apparently attempting to raise in this Court were decided against him on adequate non-federal grounds below. In such a case this Court will decline to review. *Herb* v. *Pitcairn,* 324 U. S. 117, 125-26 (1945).

CONCLUSION

For the foregoing reasons and for the reasons set forth in our briefs in No. 893 and No. 954, it is respectfully submitted that the "Brief of Sol A. Dann, Plaintiff Below, in Support of Petitions for Certiorari" should be stricken from the files, and the petitions for writ of certiorari in No. 893 and No. 954, October Term, 196-, should be denied.

Respectfully submitted,

FRANCIS S. BENSEL
ROBERT EHRENBARD
350 Park Avenue
New York, New York 10022

RICHARD F. CORROON
350 Delaware Trust Building
Wilmington, Delaware

DAVID W. PECK
HOWARD T. MILMAN
48 Wall Street
New York, New York 10005

S. SAMUEL ARSHT
DuPont Building
Wilmington, Delaware

MILTON POLLACK
111 Broadway
New York, New York 10006

ROBERT H. RICHARDS, JR.
DuPont Building
Wilmington, Delaware
Counsel for respondents, Chrysler Corporation, Ackerman, Brady, Bright, Colbert, Coleman, Dodge, Jacobson, Jones, Laughna, Leary, Love, McCollum, McElroy, McNeil, Misch, Page, Quinn, Row, Townsend, Trippe, Von Bomel, Warren, Woolson, Estate of W. A. Jones, Zeder.

APPENDIX

Rule 5(7) of the Supreme Court of Delaware:

Questions Which May be Raised on Appeal. On appeal, any question may be raised which has been fairly presented to the court below for decision, and it shall not be necessary again to raise any such question raised in the cause by way of motion for a new trial.